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IN THE

Supreme Court of the United States

MIRIAM CURNIN and THOMAS F. CURNIN,

Petitioners,

—v.—

TOWN OF EGREMONT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents mischaracterize the nature of Petitioners' First Amendment claims, attempt to raise fact issues where none exist, rely on irrelevant bodies of law and predict a supposed parade of horribles that will befall the Egremont Town Meeting—indeed, democratic institutions nationwide—if this Court were to grant certiorari and rule in Petitioners' favor. Respondents' arguments on the merits of Petitioners' claims are demonstrably overblown and incorrect. What they demonstrate most of all is Respondents' inability squarely to confront the serious conflict between the court of appeals' ruling below and decisions of this Court and other courts of appeals. The petition should be granted.

ARGUMENT

1. This Court Has Jurisdiction

Respondents incorrectly claim that because the "denial of petitioners' motion for a preliminary injunction merged with the final judgment dismissing petitioners' case," this Court "lacks jurisdiction over the matter because the petitioners have failed to appeal the entry of judgment." Brief in Opposition ("Opp. Br.") at 5. What Respondents are saying is that to seek review by this Court, Petitioners were required to appeal again to the First Circuit from the final judgment (entered as a direct and inevitable consequence of the First Circuit's ruling as to which review is sought), seek another ruling from the court of appeals on the precise issue that the court had already decided and then seek review by this

Court. Respondents are mistaken. This Court clearly has jurisdiction to review the First Circuit's decision pursuant to 28 U.S.C. § 1254(1) and none of the authorities cited by Respondents suggest otherwise.

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 513 U.S. 18, 19 (1994), addressed the question of whether federal appellate courts "should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." *Karcher* v. *May*, 484 U.S. 72, 74 (1987), addressed the question of "whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office." Neither case holds or implies that the only proper procedure available here was for Petitioners to await entry of the final judgment by the district court and return to the court of appeals yet again before seeking this Court's review.

Respondents' forced jurisdictional argument also makes no sense as a matter of judicial economy as it would require multiple and futile appeals to the appellate court that has already ruled on the legal issues at stake here. The court of appeals issued its definitive ruling affirming the denial of the preliminary injunction on November 29, 2007. App. 1a.[1] On December 10, 2007, the district court granted Respondents' motion for summary judgment, basing its decision entirely on the First Circuit's opinion. App. 23a-24a ("Although the First Circuit's review was

[1] References to "App." are to the appendix to the petition for a writ of certiorari.

titularly limited to the district court's ruling on the Motion for Preliminary Injunction, the language of [Circuit] Judge Lynch's opinion made the court's rejection of Plaintiffs' theory of recovery very clear . . . .The import of the First Circuit's opinion affirming denial of the Motion for Preliminary Injunction is that Plaintiffs' claims have no constitutional force, and that Defendants' Motion for Summary Judgment must be allowed."). On January 9, 2008, the First Circuit denied Petitioners' motion for a rehearing. App. 19a-20a. Requiring Petitioners to have then appealed the December 10, 2007 entry of judgment would have meant a third request to the First Circuit to address the same questions of law between the same parties. This path is not required by this Court's decisions nor controlling statutory authority. *See United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); 28 U.S.C. § 1254(1). This Court has jurisdiction.

2. The Petition Presents Pure Questions of Law

Respondents claim that "the Petition omits various facts which are significant to the resolution of this action," Opp. Br. at 2, and then attempt to manufacture disputes over immaterial facts. Even passing the fact that Respondents' brief in opposition is no place to be debating the underlying merits of this case, there are no relevant factual disputes here—only a fundamental dispute regarding the law. Respondents claim that they can treat Egremont residents who are not locally-registered voters differently than town residents who are voters when it comes to speech rights at town meetings despite the fact that

non-voting residents live in the town, pay taxes to the town, and receive essential services from the town. In any event, there is no dispute that at the start of the May 26, 2005 special town meeting non-voters were denied the same opportunity to speak at the meeting as that given to voters. App. 6a; J.A. 41, 108.[2] There is also no dispute that at the May 2, 2006 annual town meeting non-voters who wished to speak were told to wait until the voters had had a chance to speak.[3] App. 6a; J.A. 56. Respondents' strained effort to inject fact issues at this stage of the case is flatly contradicted by the record.

3. Petitioners Have Standing

Without discussing any of the requirements for standing, Respondents blithely insist that Petitioners have failed to establish any of the three elements of standing set forth in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). Respondents' argument is patently frivolous. The first element of the standing inquiry requires petitioners to have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent." *Id.* at 560. Here, Respondents have denied and continue to deny Petitioners the same

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[2] References to "J.A." are to the appendix of record materials filed with the court of appeals.

[3] Respondents also erroneously claim that "neither petitioner has made a desire to speak known to any respondent herein at any time." Opp. Br. at 6. The record is uncontradicted that Petitioner Thomas F. Curnin and another non-voter rose to speak at the May 2, 2006 annual town meeting and were told by Respondent Thomas Gage, the Town Moderator, to "wait" and that they "would be considered later." App. 6a. *See also* J.A. 56.

opportunity to speak at Egremont Town Meetings as that afforded other town residents. The second element of the standing inquiry requires that the injury be "fairly traceable" to the challenged action. *Id.* Here, Petitioners' First Amendment injury is a direct result of Respondents' policy to deny non-voting residents the same opportunity to speak at town meetings as that enjoyed by other town residents. The third and final element of the standing inquiry requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks and citation omitted). Here, a decision in favor of Petitioners would give them the very relief they have been seeking all along—the same opportunity to speak at town meetings as that given to voters.

Respondents' standing argument further fails because Petitioners present both an "as-applied" and a facial challenge to the Town of Egremont's discriminatory speech policy. This Court has long recognized a party's standing to bring a facial challenge to a policy or practice such as Egremont's that places unfettered discretion in the hands of a government official to decide who can and cannot speak. *Forsyth County, Georgia* v. *The Nationalist Movement*, 505 U.S. 123, 129-30 (1992); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 766 (1988).

4. By Requiring Evidence of Viewpoint Discrimination the First Circuit's Decision Below Clearly Conflicts With Decisions of this Court and Other Courts of Appeals

Respondents are incorrect in claiming that "the court of appeals did not require evidence of viewpoint discrimination as a precondition to an analysis of petitioners' 'unbridled discretion argument.' " Opp. Br. at 9. Addressing petitioners' unbridled discretion argument, the First Circuit specifically stated that

> [t]o the extent the Curnins suggest that the moderator's discretion could enable him to engage in viewpoint discrimination, there is no evidence of any such behavior here. *No evidence has been presented* to suggest that Egremont is attempting to "give one side of a debatable public question an advantage in expressing its views," *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785, 98 S.Ct. 1407, 55 L.E.2d 707 (1978). App. 16a (emphasis added).

The opinion could not be clearer in articulating that Petitioners' claim was defeated for the failure to meet an evidentiary burden that is simply not required under controlling constitutional principles. Stated another way, had petitioners "presented" such evidence, the First Circuit indicated that it would have entertained Petitioners' unbridled discretion claim. The First Circuit thus ignored a long line of authority from this Court and other federal appellate courts holding that it is the *mere threat* of viewpoint discrimination that condemns placing unbridled discretion in

the hands of local officials, not actual evidence of viewpoint discrimination, which is often difficult if not impossible to show in these circumstances. *See* Petition at 13-15.

Respondents also attempt to blunt the unbridled discretion problem by arguing that the Town Moderator "acts at all times at the pleasure of the legislative body, which has the ultimate authority to determine how legislative sessions are conducted." Opp. Br. at 10. While this may be an accurate statement of town meeting procedure, it is flawed on many levels. First, as a practical matter, and as demonstrated in the record, the Town Moderator calls the shots at town meetings with respect to various matters of order, including determining who gets to speak and when. It is clear that the Town Moderator has made decisions regarding who can and cannot speak on important issues of public concern for reasons only he knows. *See* J.A. 34. For example, when asked during his deposition what the protocol is when a non-voter wishes to speak at a town meeting, Respondent Thomas Gage responded "[i]t depends on the issue I guess. . . . Sometimes I go to the town and ask them if they will allow [non-voters] to speak. . . . Depending on the issue." Second, the practice of putting the issue of speech rights to a vote of the town meeting, as was done at the May 26, 2005 special town meeting, J.A. 41, 108, only trades one constitutional defect for another. It is well settled that fundamental rights, such as the right to freedom of speech, cannot be left to the vicissitudes of a majority vote. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624,

638 (1943) ("One's right to life, liberty, and property, to free speech, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

5. The First Circuit's Decision on the Application of the Public Forum Doctrine Conflicts With Decisions By this Court and Other Courts of Appeals

As discussed in the petition, in holding that public forum analysis is inapposite to the Egremont Town Meeting, the decision below conflicts with this Court's decision in *City of Madison, Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), and authoritative rulings of the Ninth and Tenth Circuit Courts of Appeals. Petition at 16-20. Attempting to argue otherwise, Opp. Br. at 11-15, Respondents ignore the fact that the Egremont Town Meeting is a form of direct democracy and not a representative body.

The Egremont Town Meeting is an open town meeting—*i.e.*, a direct democracy—that exists only when it is in session and whose composition cannot be determined until the meeting is called to order. This important distinction explains why Respondents' argument based upon representative bodies such as the United States Congress is flawed. Opp. Br. at 13. When a legislature is representative in nature, citizens need not be given the opportunity to address it directly. They may instead lobby their elected representatives, and may do so whether or not they are registered voters or even voted for that particular representative.

This Court has recognized the distinction between direct and representative forms of democracy. For example, while *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), stands for the proposition that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy," the Court made clear that it was referring to our country's republican—or representative—form of government. 465 U.S. at 283. The Court even cited Justice Holmes in noting that " '[t]he Constitution does not require all public acts to be done in *town meeting* or an assembly of the whole.' " *Id.* at 284 (*quoting Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915)) (emphasis added). Of course, the Egremont Town Meeting is a town meeting and not a representative body to which the Court's comments in *Knight* were directed.

That the Egremont Town Meeting does not set time aside at each meeting for public comment does not distinguish it from the public meetings at issue in *City of Madison*; *Kindt* v. *Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995); and *Mesa* v. *White*, 197 F.3d 1041 (10th Cir. 1999). There is simply no reason to set a time for public comment in a direct democratic body as there is in a representative one. If a person wishes to speak at the Egremont Town Meeting he or she simply stands up and waits to be acknowledged by the Town Moderator. J.A. 262.

Respondents argue that *Mesa* and *Kindt* are further distinguishable because they did not involve legislative bodies in session. Respondents

are splitting hairs. While it is true that these cases did not address a town meeting such as the Egremont Town Meeting, they did address local governmental bodies that set policy. *See Kindt*, 67 F.3d at 267 (an elected rent control board); *Mesa*, 197 F.3d at 1043 (a county commission). Moreover, it is unlikely that any other federal court of appeals will address the issue of speech restrictions at open town meetings as the town meeting form of government is employed primarily in New England. This Court's certiorari jurisdiction is not so stingy. There is a split in authority between the First Circuit on the one hand, and the Ninth and Tenth Circuits on the other hand, on the important issue of whether speech restrictions at the municipal government level should be subject to public forum analysis. This doctrinal split involving the proper First Amendment scrutiny to be applied to these speech restrictions warrants this Court's review.

6. The Petition Raises No Federalism or Separation of Powers Concerns

Respondents distort and overstate petitioners' claims in urging that "petitioners wish this Court to depart from settled law by treating municipal legislatures differently from other legislative bodies" and "seek the Court's intervention in the legislative process itself." Opp. Br. at 7. Indeed, Respondents go so far as to brazenly attempt to convince this Court that Petitioners are asking it to do no less than to "overturn[ ] a long line of Massachusetts precedent and, effectively, legislat[e] a fundamental shift in the nature and status of a legislative body." *Id.* Petitioners request no such thing. Petitioners fully recognize the

legal status of the Egremont Town Meeting as a municipal legislature. The relief they seek does not require this Court to interfere in the legislative process by setting aside votes or other actions taken by the town meeting as Respondents' brief implies. *Id.* at 7-8. And Petitioners do not "assert that they have a First Amendment right to address the Egremont Town Meeting because it is the legislative arm of the Town of Egremont . . . ." *Id.* at 7. Petitioners merely request that non-voting resident taxpayers be given the *same opportunity* to speak at Egremont Town Meetings as that given to resident voters. Declaring that a non-discriminatory speech policy is required by the First Amendment will hardly embroil the federal courts in the decisions of a local legislative body.

7. The Doctrine of Legislative Immunity Does Not Bar Petitioners' Claims

Respondents also urge that the doctrine of legislative immunity is fatal to Petitioners' claims. That is not the case. The Town of Egremont is not a legislature and it is fully within the authority of the federal courts to enjoin the town and its officers from enforcing its unconstitutional policy of exclusion. *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) (Municipalities and local governing bodies "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."). As for the individual Respondents, their actions in

denying Petitioners the same opportunity to speak at town meetings as that given to other town residents cannot accurately be characterized as "legislative acts" entitled to protection under the doctrine of legislative immunity. *See, e.g., Negron-Gaztambide* v. *Hernandez-Torres*, 35 F.3d 25, 28 (1st Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995).[4]

[4] Neither the district court nor the court of appeals ruled on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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